UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VAGUELY QUALIFIED PRODUCTIONS LLC,

Plaintiff,

v.

METROPOLITAN TRANSPORTATION AUTHORITY (the "MTA"); THOMAS F. PRENDERGAST, in his official capacity as Chairman and Chief Executive Officer of the MTA; and JEFFREY B. ROSEN, in his official capacity as the Director of the MTA Real Estate Department,

Defendants.

Case No. 1:15-cv-04952-CM

ORAL ARGUMENT REQUESTED

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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September 11, 2015

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INTRODUCTION

The arguments that Defendants Metropolitan Transportation Authority ("MTA"), Thomas F. Prendergast, and Jeffrey B. Rosen (collectively, "Defendants") advance in support of their Motion to Dismiss, buried among and entangled with arguments opposing Plaintiff's Motion for a Preliminary Injunction, do not even approach the high bar for dismissal under Fed. R. Civ. P. 12(b)(6). They fail to show that Vaguely Qualified Productions LLC ("VQP") is not entitled to offer evidence to support its claims that Defendants violated the First Amendment by refusing to display in the subway system six ads (the "Ads") promoting *The Muslims Are Coming!* feature film (the "Film") and VQP's brand.

Defendants' many assertions are grounded in declarations and factual allegations that may not be considered in support of a motion to dismiss, and fail to justify their violation of VQP's First Amendment rights. When VQP first submitted the Ads in November 2014, Defendants chose to delay and censor the Ads, rather than display them, even though they were plainly consistent with the MTA's advertising standards in force at that time (the "2012 Advertising Standards"). In March 2015, Defendants finally approved the Ads and agreed to display them, but never did. The MTA then enacted a new advertising policy (the "Revised Policy"), and Defendants promptly misclassified the Ads and rejected them as "political in nature," so they could turn around and trumpet that rejection in unrelated litigation with the American Freedom Defense Initiative (the "AFDI"). The First Amendment permits none of this.

Defendants claim that the long delay was an honest mix-up, and that they strictly applied the Revised Policy, an application that absurdly required the rejection of ads, such as one that humorously announced that Muslims hate getting that last bit of toothpaste out of the tube, because their underlying theme—that American Muslims are ordinary people—"makes an important political statement." Defendants' Memorandum Of Law In Opposition To Plaintiff's Motion For A Preliminary Injunction And In Support Of Defendants' Cross-Motion To Dismiss The Complaint at 3, Vaguely Qualified Productions LLC v. Metropolitan Transportation Authority, No. 15-04952 (S.D.N.Y. August 28, 2015), ECF No. 41 (the "Combined Brief" or "MTA Br."). Also, Defendants contend that VQP was motivated to run the Ads to counter an ad proposed by the AFDI, and since the latter was "political in nature," surely the former is too.

VQP disagrees, and in its Amended Complaint (the "Complaint"), alleges more than adequate facts to establish that Defendants violated their First Amendment rights by applying the Revised Policy in a way that was neither reasonable nor viewpoint neutral, and certainly fails to meet strict scrutiny. The Complaint further alleges VQP is entitled to nominal damages for Defendants' unconstitutional intentional delay in running the Ads under the 2012 Advertising Standards. Accordingly, the Court should deny Defendants' Motion to Dismiss.

LEGAL STANDARD

In deciding a motion to dismiss, a court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 51–52 (2d Cir. 2012). The Court may not grant a motion to dismiss unless "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Jaghory v. N. Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 587 (U.S. 1984)). "This rule applies with particular force where the plaintiff alleges civil rights violations . . . ." *Williams v. Williams*, No. 13-CV-3154 (RA), 2015 WL 568842, at *2 (S.D.N.Y. Feb. 11, 2015) (quoting *Chance v. Armstrong*, 143 F.3d 698, 701 (2nd Cir. 1998)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Basak v. N.Y. Dep't of Health*, 9 F. Supp. 3d 383, 389 (S.D.N.Y. 2014) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

ARGUMENT

I. DEFENDANTS' RULE 12(b)(6) MOTION IMPROPERLY RELIES ON FACTUAL ASSERTIONS OUTSIDE THE COMPLAINT

A. At The Motion To Dismiss Stage, The Court Can Look Beyond The Facts Alleged In A Complaint Only In Clearly Delineated Circumstances

At the motion to dismiss stage, only the facts alleged or relied upon in the complaint may be considered, with certain very limited exceptions. *Staehr v. Hartford Fin. Servs. Group., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) ("Although the general rule is that a district court may not look outside the complaint and the documents attached thereto in ruling on a Rule 12(b) motion to dismiss, we have acknowledged that the court 'may also consider matters of which judicial notice may be taken.'" (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991))). "For purposes of this general rule, 'the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (quoting *Int'l Adiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (per curiam)). Judicial notice, in turn, may be taken only for facts that are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (f); *see also In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 367 (E.D.N.Y. 2010) (citing *Hayden v. Paterson*, 594 F.3d 150 168 n.14 (2d Cir. 2010)).

B. Defendants Cannot Dispute Facts at the Pleading Stage

Incredibly, Defendants' Motion to Dismiss rests on factual challenges to the allegations in the Complaint. The Combined Brief makes repeated references to extrinsic documents, including a declaration submitted by an MTA official,[1] to contest the version of events pled in the Complaint. The Court should reject Defendants' invitation to decide facts at the pleading stage and should instead permit discovery to go forward on both claims in the Complaint.[2]

As described in more detail below, VQP has alleged ample facts to establish plausible claims that (1) VQP's rights were violated under the 2012 Advertising Standards because Defendants purposefully and unreasonably delayed running the Ads for more than five months—one month of which the Ads had actually been approved for display—and (2) VQP's rights were violated under the Revised Policy because the Ads were improperly rejected under that policy. Compl. ¶¶ 23–34. Defendants' factual assertion that they did not become aware of the Ads until February 2, 2015, made in an attempt to defeat VQP's first claim, is extrinsic to the Complaint and may not be considered. *See Friedl v. City of N.Y.*, 210 F.3d 79, 83 (2d Cir. 2000). With respect to the second claim, Defendants rely extensively on factual assertions made in declarations and news articles attached to their motion.[3] *See id.* For example, in arguing that the

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[1] Defendants' claim their Motion to Dismiss does not rely on the declaration, but they make no attempt to distinguish the facts from that document and those from the many others upon which they rely, from the allegations in the Complaint upon which they may properly rely.

[2] While Defendants seek dismissal of the entire Complaint under Rule 12(b)(6), *see* MTA Br. at 5 ("VQP's Complaint on the whole—should be dismissed for failure to state a claim"), the substantive arguments they advance apply solely to the first claim for relief (Violation of the First Amendment Under the 2012 Advertising Standards). Defendants advance no arguments why the Court should dismiss the second claim for relief (Violations of the First Amendment Under the Revised Policy). *Id.* at 32–35. Defendants' request that the claim under the Revised Policy be dismissed should be rejected for that reason alone.

[3] While courts may in some cases take judicial notice of news articles for the proposition that certain statements appeared in the news, courts may not take judicial notice of news articles as evidence of the truthfulness of statements or factual assertions that appear in the articles. *See Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (reaffirming that "it is proper to take judicial notice of the *fact* that press coverage, prior lawsuits or regulatory filings contained certain information, without regard to the truth of their contents…"); *Condit v. Dunne*, 317 F. Supp. 2d 344, 358 (S.D.N.Y. 2004) ("The Court does not look to the substance of the

Court should uphold their determination that the Ads are not "commercial" and are "political," Defendants relied on statements reported in news articles about the "purpose" of the Ads, attributed to Negin Farsad, Director of VQP, and Dean Obeidallah, Co-Director of the Film, MTA Br. at 23–24, 26–27, and as characterized by declarants, *id.* at 24–25, 27–28. They also rely on declarants' factual assertions about the content and purpose of other ads accepted under the Revised Policy, which VQP has cited as comparable to its Ads. MTA Br. at 28–29.

Defendants' impermissible reliance on factual assertions in declarations and news articles underscores that resolution of the claims require factual discovery, and thus cannot be resolved on a motion to dismiss or even upon conversion of that motion to one for summary judgment. *See Global Network Commc'ns, Inc. v. City of New York,* 458 F.3d 150, 155 (2d Cir. 2006) ("The streamlined testing of substantive merits . . . is more appropriately reserved for the summary judgment procedure, governed by Fed. R. Civ. P. 56, where both parties may 'conduct appropriate discovery and submit the additional supporting material contemplated by' that rule." (quoting *Chambers*, 282 F.3d at 154)).

II. DEFENDANTS VIOLATED VQP'S FREE SPEECH RIGHTS

A. Defendants' Rejection Of VQP's Commercial Ads Under The Revised Policy Violated The Free Speech Clause Of The First Amendment

Under the structure of the Revised Policy, Defendants must engage in two separate inquiries to determine the acceptability of an advertisement. First, the ad must fall within one of the categories of "Permitted Advertising," i.e., speech that fits certain definitions of "commercial

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articles to resolve any disputed issue on defendant's motion, but does consider the fact of the publication of these articles as evidence of the media frenzy, and thus takes judicial notice of the widespread publicity and speculation that focused on the disappearance of Ms. Levy."). Thus, the news articles that Defendants cite for the truth of what the media reported (i.e., that a particular statement was made to the media or that such statement is true) are not proper subjects of judicial notice.

advertising," "governmental advertising," or "public service announcements" (collectively, "Permitted Categories").[4] Second, the ad must not fall under one of the categories of "Prohibited Advertising," which includes speech that is "political in nature".[5] As described in detail below, Second Circuit cases support that the Court review Defendants' application of that policy to reject VQP's Ads under strict scrutiny. However, because Defendant's rejection of the Ads fails to pass constitutional muster under either strict scrutiny or Defendants' proffered reasonable and viewpoint neutral standard, we begin with the latter.

1. The Ads Are "Commercial Advertising" Under The Revised Policy

First, the VQP Ads clearly fall into the Permitted Category of "commercial advertising." Indeed, Defendant Rosen's final decision rejecting the Ads (the "Final Determination") fails to assert that the Ads are not "commercial advertising;" it merely asserts (incorrectly) that the Ads are "political in nature." Compl. ¶ 40.[6]

The Revised Policy defines "commercial advertising" as "[p]aid advertisements that propose, promote, or solicit the sale, rent, lease, license, distribution, or availability of, or some other commercial transaction concerning, goods, products, services, or events for the advertiser's commercial or proprietary interest, or more generally promote an entity that engages in such activities."[7] Not only does the Complaint allege adequate facts to establish that the Ads promote the sale, distribution, and availability of goods and products, it unquestionably alleges that the Ads more generally promote an entity that engages in such activities. The Complaint alleges that:

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4 MTA Board Action Items, Exhibit I to Compl., at 165.

5 *Id.* at 166–67.

6 The Final Determination states, in relevant part: "I have reviewed the six 'Muslims are Coming' advertisement[s] under the new MTA Advertising Policy and have concluded that they are within one of the categories of prohibited advertisements, Section IV.B.2, because they are political in nature." Compl. ¶ 40.

7 MTA Board Action Items, Exhibit I to Compl., at 165.

- "Plaintiff VQP is a for-profit limited liability company formed under the laws of the state of New York. VQP is an award-winning and critically acclaimed video production company that creates viral videos, television and web shows, and narrative and documentary feature films. VQP's mission is to create 'smart, insightful, and comedic social justice media.'" Compl. ¶ 12.

- "In 2013, VQP produced 'The Muslims are Coming!' a feature film documentary that follows a band of American Muslim comedians as they perform stand-up comedy and interact with residents in big cities, small towns, and rural villages." Compl. ¶ 17.

- "Beneath the humorous content, each poster promotes the VQP brand and refers the reader to www.themuslimsarecoming.com, the website that promotes 'The Muslims are Coming!' and through which VQP offers the film and related merchandise for sale." Compl. ¶ 19.

- "[T]he Advertisements proposed by VQP, a for-profit company, prominently advertise a central theme in the feature film, 'The Muslims Are Coming!' Each advertisement includes the text, 'For More Visit: www.themuslimsarecoming.com,' encouraging viewers to visit a website featuring information about the film, a promotional video clip, and links to download the film from Amazon, iTunes, and Xbox. VQP's Advertisements promote and solicit the sale of VQP's commercial product—'The Muslims Are Coming!' Because a central theme of the film is American Muslim comedians making their way through the United States, the Advertisements contain satirical and ironic statements that depict American Muslims as ordinary people." Compl. ¶ 43.

Thus, it cannot be reasonably disputed that the Ads, on their face, invite viewers to the Film's website, the purpose for which is to promote the Film and generate sales for a for-profit video production company that seeks income from its media productions.

Defendants counter that the Ads do not "read as" commercial advertisements for a film, that the Ads were not "tied to a specific commercially significant event," and that Obeidallah and Farsad "barely" mentioned the Film in their correspondence with Outfront Media and "only in passing—if at all" in public statements about the ad campaign. MTA Br. at 22–25. As an initial matter, Defendants' grounding of these assertions in declarations and factual allegations referenced in their Combined Motion may not be considered at the motion to dismiss stage. *See*

Friedl, 210 F.3d at 84.[8] In any case, as explained in VQP's Motion for Preliminary Injunction, Defendants are wrong on the facts. The Ads were indeed tied to a "specific commercially significant event"—the timing of the Ads was driven, in part, "by VQP's ongoing contractual relationship with online distributors, such as Netflix and Amazon."[9]

Defendants' claim that the Ads do not appear, on their face, to be advertisements for a film is similarly misguided, as the Ads promote the central theme of the Film and contain the Film's website address. That they do not expressly proclaim, "This is a Movie," or use some similar language, is of no moment. As Defendants are well aware, "teaser" ads are quite common in the advertising industry. So much so, that the 2012 Advertising Standards provided:

> MTA and the advertising contractor may permit the display of "Teaser ads" promoting a commercial transaction that do not readily and unambiguously identify the sponsor, provided a similar number of follow up advertisements that do readily and unambiguously identify the sponsor are posted within a time specified by MTA or the advertising contractor.

2012 Advertising Standards § (b)(v).

That VQP's Ad is not a bare teaser ad does not render it non-commercial. As an example, Defendants point out that in the footer text, along with the website address, VQP made a joke about fine print. But a commercial advertiser's strategic and creative decisions are not subject to review by Defendants, who may not appreciate how to most effectively advertise films and products. In fact, commercial ads for films and other products often omit specific information about the film or product in an effort to pique the curiosity of readers and drive their attention to a website address, from which the advertiser can more easily convert the reader to a consumer. In this situation, the MTA has deemed itself as the arbiter of effective advertising, yet it cannot demonstrate any understanding of the underlying strategic decisions that were involved in creating the Ads. For example, Defendants claim that the timing of the Ads is politically motivated, as it was in response to the AFDI advertisement campaign, but they fail to take into account that VQP may have reasoned that the renewed interest in Muslims at the time would generate more publicity for the Film and, as such, would be commercially beneficial. As a transit authority and its agents, Defendants' failure to appreciate the strategic and creative considerations involved in marketing is understandable, but that failure does not rob VQP's advertising of its commercial character. Similarly, Obeidallah and Farsad's strategic decisions on how best to generate publicity for the ad campaign, and therefore the VQP brand and the Film, do not transform VQP's commercial ads into something less.

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[8] In *Good News Club v. Milford Cent. School*, 21 F. Supp. 2d 147, 150–51 (N.D.N.Y. 1998), *aff'd on other grounds*, 202 F.3d 502 (2d Cir. 2000); *rev'd on other grounds*, 533 U.S. 98 (2001), the court was faced with the question of once the government establishes a forum as a limited forum, whether the government "respect[ed] the lawful boundaries it has itself set." The court ruled: "Clearly, this issue presents fair ground for litigation, as it can only be resolved after 'full and complete proof of the nature' of [the speech in question]." *Id.* at 151. Similarly here, the Court should permit the parties to conduct discovery before deciding whether the Defendants have respected the lawful boundaries they set in the Revised Policy.

[9] Declaration of Negin Farsad at ¶ 8 (ECF. No. 32).

Moreover, because the Revised Policy defines "commercial advertising" to include ads that "more generally promote an entity that engages in [the proposal, promotion, or solicitation of the sale, rent, lease, license, distribution, or availability of, or some other commercial transaction concerning, goods, products, services, or events]," the Ads clearly qualify.[10] As alleged in the Complaint, VQP is a for-profit company, and the Ads promote VQP's brand, style of humor, and website. *See* Compl. ¶ 19. Thus, the Ads fit squarely within the Revised Policy's definition of "commercial advertising."

Defendants reliance on *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) is also misplaced. In that case, the plaintiff—a religious anti-abortion group—tried to fit a clearly non-commercial anti-abortion ad into the defendants' limited public forum for "speech which proposes a commercial transaction" by inserting the statement, "[p]urchase this message as a bumpersticker for your vehicle" with a phone number at the bottom of the ad. *Id.* at 975. The court found that this last-ditch effort did not suffice to render the ad one that proposes a commercial transaction because the new statement was simply a commercial appendage to a non-commercial message aimed at transforming the speech. *Id.* at 981–82. Here, by contrast, the Ads as a whole promote VQP's commercial goods, as well as VQP—an entity that engages in commercial activities—by previewing the central theme of the Film. Compl. ¶¶ 19, 43. Moreover, unlike in *Children of the Rosary*, the plaintiff here is a for-profit entity engaged in the sale of media, and the Film promoted by the Ads is a well-established product of the company—not an after-the-fact creation manufactured to satisfy MTA's commercial advertising requirement. Compl. ¶¶ 12, 17. Defendants' likening of VQP's Ads to the ads at issue in *Children of the Rosary* is, therefore, misguided.

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[10] *See* MTA Board Action Items, Exhibit I to Compl., at 165.

For these reasons, the Ads fall squarely and clearly within the Revised Policy's Permitted Category of "commercial advertising," and it would be unreasonable for Defendants' to find otherwise—a conclusion bolstered by the fact, alleged in the Complaint, that Defendants actually never did conclude otherwise.

2. Defendants' Rejection Of VQP's Ads As "Political in Nature" Was Unreasonable

Second, the Ads are not "political in nature" under the Revised Policy, and Defendants' misclassification of them as such was not a reasonable application of the Revised Policy.

In deciding to reject the Ads as "political in nature," Defendants unreasonably relied on considerations outside the contents of the Ads, including statements by Farsad and Obeidallah in *The Daily Beast* alluding to the motivation behind the advertising campaign. Because these considerations are not relevant under the Revised Policy, the Defendants' application of the Revised Policy was unreasonable and thereby violates the First Amendment.

Throughout their Combined Brief, Defendants go to great pains to defend their assessment that the Ads were "designed" or had a "purpose" to "counter the anti-Muslim ads posted by the AFDI." MTA Br. at 3, 23, 25, 31. Defendants point out that VQP named its ad campaign the "Fighting-Bigotry-with-Delightful-Posters Campaign," state that the campaign was "financed through a crowd-funding campaign specifically designed to further that cause," and quote statements from Obeidallah and Farsad in *The Daily Beast*. *Id.* at 11–12, 22–27. If the subjective purpose behind the Ads is relevant to determining compliance with the Revised Policy, VQP has alleged sufficient facts to allow the case to go forward and the parties to conduct discovery regarding its subjective purpose. Nevertheless, *even if* the purpose of the Ads were solely to respond to bigotry or to political ads, that fact would not provide a reasonable basis to classify the Ads as "political in nature" under the Revised Policy.

First, the Revised Policy's definition of "political in nature"—which in relevant part defines the term as including ads that "[p]rominently or predominately advocate or express a political message"—speaks only to the content of proposed ads, not to the purpose or motivation behind their creation.[11] Defendants therefore unreasonably applied the Revised Policy by making their decision based upon the perceived motivation or purpose of the Ads rather than their content. If the Ads do not "[p]rominently or predominately advocate or express a political message," which they do not, they are not "political in nature" as defined by the Revised Policy, regardless of whether Obeidallah and Farsad advocated political messages when speaking about the Ads to journalists, or if they decided to run the Ads after learning about the AFDI's ad.

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[11] MTA Board Action Items, Exhibit I to Compl., at 166.

Unless Defendants can show that such advocacy manifested itself in the content of the Ads, which they have not, VQP's motivation and purpose are irrelevant under the Revised Policy, and thus are unreasonable bases to conclude that the Ads are "political in nature" under that policy.

Second, the Revised Policy's guidelines for the MTA's review of ads proposed for display (the "Display Guidelines") do not give the Defendants latitude to consider information outside the content of a proposed ad.[12] The relevant portion the Display Guidelines states that the "Director of Real Estate, in reaching a final determination . . . may consider any materials submitted by the advertiser." The Display Guidelines do not permit the MTA or any of its agents to conduct an investigation into the motivation, design, or purpose of ads or the products they advertise. The Display Guidelines also lay out a process by which advertisers can submit changes to proposed ads to bring them in line with the Revised Policy. But if ad-makers' "designs" or "motivations" are sufficient to render proposed ads "political in nature," it is unclear how changes to the substance of proposed ads could ever bring them in line with the Revised Policy. Simply put, VQP's motivation or design behind the Ads were not fair game for the Defendants to consider under the express terms of the Revised Policy, and thus, the Defendants' consideration of such extraneous information was an unreasonable application of that policy. Allowing MTA or its agents discretion to determine ***when*** to evaluate extrinsic information effectively vests them with unbridled discretion to veto any commercial advertising campaign by simply looking for extrinsic evidence of "political" motivation associated with the advertiser: Is a company selling electric cars motivated by a desire to protect the environment? Is a grocer motivated to promote only organic foods?

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[12] MTA Board Action Items, Exhibit I to Compl., at 167–68.

Third, a common sense application of the Revised Policy dictates that proposed advertising does not become "political in nature" and thereby prohibited merely because the ad-maker was motivated by a desire to counter political or bigoted sentiment. Otherwise, a group organizing a film festival featuring the work of female directors in response to sexist sentiment expressed by a third party, or an international food festival in response to xenophobic third parties or their messages, would be prohibited from running ads promoting those events. This result would hold even if the ads did not mention the sexist or xenophobic messages and merely advertised the events, simply because the context in which the ideas arose rendered ads promoting them "political in nature."

Moreover, Defendants conception of the message that "American Muslims are ordinary people" as political due to the existence of discrimination, controversy, and bigotry targeting American Muslims is overbroad inasmuch as it politicizes any theme that contests a claim that a targeted minority group is inferior to the majority. These claims are often implicit, representing members of the minority as ordinary, and it is only when the portrayal of the minority group as ordinary or normal is *politicized* by external groups that Defendants claim the portrayal is political. For instance, by Defendants' logic, ads that ran in the 1990s for the popular television show *Will and Grace* would be prohibited as "political in nature," since its "underlying message" was in fact central to the program—that gay and lesbian Americans are ordinary people. The Revised Policy does not permit such meddlesome scrutiny, and the First Amendment does not allow such arbitrariness.

The foregoing are all reasons why it was unreasonable for Defendants to assess statements or motives not apparent based on a review of the "four corners" of the Ads when making their determination that the Ads were "political in nature."

Defendants counter that it is "untenable and inconsistent with the law" to suggest that the "MTA had to make [its] determination in a vacuum, based only on the 'four corners of the Advertisements.'" MTA Br. at 21. Defendants seek support from cases in which a court reviewed a transit authority's rejection of a proposed ad as "political," but in none did the transit authority specify factors to consider, as Defendants did here. Moreover, in those cases, no court blessed the transit authority's consideration of statements or motives not apparent based on a review of the four corners of the ads and the websites they listed. *See Id.* at 21–22. In *AFDI v. Suburban Mobility Authority for Regional Transportation* ("*SMART*"), 698 F.3d 885 (6th Cir. 2012), the Sixth Circuit noted that it "may look beyond the four corners to websites that the advertisement incorporates by reference." *Id.* at 894. VQP certainly does not contest the propriety of considering the website incorporated by reference in the Ads (www.themuslimsarecoming.com). Indeed, by accessing this website a reader would become immediately aware that the Ads were advertisements for the Film, which is prominently advertised and made available for purchase on the website. The Sixth Circuit also noted that it must have "knowledge of the current political context" to categorize the plaintiff's ad. *Id.* at 893. In that case, the ad itself referenced controversial current events such that knowledge of the "political context" was needed to understand the ad. *Id.* at 888 (noting that the ad read "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got Questions? Get Answers! RefugefromIslam.com."). In other words, the "political context" affected how a reasonable reader would read the ad. The analogy between knowledge of the political context in *SMART* and knowledge of VQP's supposed motives does not hold. VQP's Ads stand on their own as humorous promotions of VQP's brand and the Film, and a reasonable reader need not be aware of VQP's "motives" (as the Defendants incorrectly frame them) to understand them. By

Defendants' reasoning, an ad for a water purifier placed during a time that clean water policy was being hotly debated could be rendered "political" if the MTA opted to consider the "political context," despite the fact that such context would be unnecessary to understanding the ad.

In the other case Defendants' cite, *AFDI v. MTA* ("*AFDI I*"), Judge Engelmayer considered the content of websites listed in an ad to determine whether the MTA had properly classified that ad as prohibited. 880 F. Supp. 2d 456, 466–69 (S.D.N.Y. 2012). As Defendants note, Judge Engelmayer stated that the MTA's "consult[ing] these websites in the course of making its determination . . . was appropriate: ***Because these websites are listed in the AFDI Ad itself, they are fairly considered in assessing how a reasonable reader would interpret the Ad***." MTA Br. at 21-22 (quoting *AFDI I*, 880 F. Supp. 2d at 468) (emphasis added). Here, *The Daily Beast* website the Defendants considered was not listed in any of the Ads, and as noted above, a reasonable reader would not interpret the Ads with reference to that third-party website. The Ads promote the VQP brand and Film, and direct readers to VQP's website, which contains none of the statements in *The Daily Beast*. Thus, the comparison to *AFDI I*, in which the challenged ad directed readers to a website that the court properly considered because it contained information elucidating the substance of that ad, is inapposite here.

In an attempt to demonstrate that the "content of the Ads themselves is plainly political when viewed in context," the Defendants go through each of the six Ads and offer their take on each's underlying message. MTA Br. at 27. It is unclear on what the Defendants base their inventive interpretations. For instance, VQP neither agrees with nor fully understands the assertion that the "obvious intent of the Frittata Ad is to use humor to satirize (and thereby undermine) alarmist messages that the 'ugly truth' about Muslims is that they all hate Jews or that they all support al Qaeda." *Id.* This ad equally lends itself to an interpretation that plays off a reader having no preconceptions of Muslims, and certainly does not require an allusion to the highly-charged and politicized themes the MTA identifies. It is worth noting that even some of the MTA's own imaginative interpretations hardly suggest that the content of the Ads is "political in nature." For example, the MTA claims that one of VQP's Ads advances the message that there have been "major contributions to society by Muslims throughout history." *See* MTA Br. at 27. Even assuming that is true, MTA's conclusion that this ad must therefore be "political in nature" and therefore prohibited by the Revised Policy would give the MTA a license to police the subtle intent of advertising in a way that is not only arbitrary, but bizarre. Consider an ad for a restaurant's lasagna made "in the rich tradition of Italian cooking" or for an automobile manufactured with "the finest German engineering." Defendants propose either an absurd application of the Revised Policy or one that applies only to Muslims and other minority groups touting their achievements in an effort to market their products. In any case, it is enough to note that creative commercial messaging is often subject to varying interpretation and reactions, which is in part what makes it interesting and effective at drawing attention, provoking discussion, and therefore generating interest in the product, service, or brand advertised.

Finally, Defendants attempt to obfuscate the reality that the Ads, rather than being political in nature, have a straightforward "comedic" and "tongue-in-cheek" nature by arguing that this conception "underestimates the critical role that humor has played in political discourse and social change throughout history." MTA Br. at 26. Defendants point out that "Courts have long acknowledged that satirical expression is 'no less protected because [it] provide humorous rather than serious commentary.'" *Id.* (quoting *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996) (holding that parody baseball cards that "provide social commentary on public figures" are entitled to First Amendment protection)).

Cardtoons did not involve a question of whether speech was political, merely the question of whether it was entitled to First Amendment protection. Unpacked, the Defendants are making the uncontroversial point that funny speech gets First Amendment protection, too. And of course there have been instances in which "cartoons have played a prominent role in public and political debate." *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53–55 (1988)). In the case Defendants cite, the humorous speech at issue was a political cartoon containing a caricature of a "commentator on politics and public affairs." *Hustler Magazine*, 485 U.S. at 47. There is no debate (or great insight) in the point that political cartoons can be both "political nature" and "comedic." Clearly, though, just because humorous speech has the potential to be political does not mean that humorous speech is, by definition, political. VQP's Ads, unlike political cartoons, are not "political in nature," and VQP intentionally omitted from the Ads any politically or socially controversial statements. To the extent the Defendants' argument attempts infuse the Ads with a political spin they do not have, it falls flat.

3. Defendants' Rejection Of The VQP Ads As "Political In Nature" Was Not Viewpoint Neutral

In addition, facts and circumstances surrounding Defendants' rejection of the Ads reveal that Defendants' misclassification of them as "political in nature" was not viewpoint neutral, and thus violated the First Amendment. At the very least, the presence or absence of viewpoint discrimination requires discovery and may not be resolved at the motion to dismiss stage.

First, the timing and record suggest that the Defendants were improperly motivated by a desire to reject ads they could label "pro-Islam" to provide an image of even-handedness in the wake of their decision to reject an "anti-Islam" ad. Throughout the first quarter of 2015, while VQP was awaiting the Defendants' decision to display or reject the Ads under the 2012 Advertising Standards, the Defendants were engaged in litigation with the AFDI concerning the

Defendants' refusal to display an ad containing text that read "Killing Jews is Worship that draws us close to Allah."[13] Moreover, in the course of that litigation, Defendants repeatedly referenced their rejection of the VQP Ads to make the point that they applied the Revised Policy without regard to viewpoint.[14] In other words, Defendants sought to reject ads that they could position as the equal and opposite of AFDI's ad (even if inaptly). The timing and record shows that the Defendants targeted VQP's Ads based on their viewpoint, which is not permitted by the First Amendment.

VQP has adduced additional evidence of viewpoint discrimination, as detailed in VQP's Motion for Preliminary Injunction. For example, two ads that Defendants have permitted to run under the Revised Policy, one that promotes the film *Straight Outta Compton*, and one that promotes the television series *Mr. Robot*, address controversial political topics and public statements by their producers and directors reveal political motives. Yet, Defendants apparently never found it necessary to dig for such statements or review any articles associated with these ads. Defendants' use of these tactics to screen out ads that promote the Film, while failing to use these same tactics for ads that promote film and television media through references that could be considered equally or even more "political in nature," is quintessential viewpoint discrimination and is not permitted by the First Amendment. *See Good News Club v. Milford*

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[13] *See AFDI v. MTA ("AFDI III")*, No. 14 Cv. 7928(JGK), 2015 WL 3797651 at *2 (S.D.N.Y. June 19, 2015); *Am. Freedom Def. Initiative v. Metro. Trans. Authority*, Case No. 14-cv-7928, (S.D.N.Y.), Declaration of Jeffrey B. Rosen, ECF. No. 46 ("Rosen Decl.") ¶ 35. The Court may take judicial notice of the fact of concurrent ongoing proceedings from filings in other judicial cases for evidence of Defendants' viewpoint discrimination in rejecting the Ads. *See Staehr*, 547 F.3d at 425.

[14] *See, e.g., Am. Freedom Def. Initiative v. Metro. Trans. Authority*, Case No. 14-cv-7928, (S.D.N.Y.), Supplemental Declaration of Jeffrey B. Rosen, ECF. No. 53 ("Supp. Rosen Decl.") ¶ 22 (referencing the rejection of the Ads as "putting a lie to the AFDI's accusation that the MTA adopted the [Revised] Policy because the MTA dislikes and wants to censor AFDI's viewpoint").

Cent. Sch., 533 U.S. 98 (2001) (holding that where limited public forum was created to promote moral and character development of children, the rejection of a group that taught children moral values by use of religious references was viewpoint discrimination); *Lebron v. Nat'l RR Passenger Corp. (Amtrak)*, 69 F.3d 650, 658 (2d Cir. 1995) ("Of course, if such a policy were used to screen out only controversial political advertisements—that is, political advertisements distasteful to the majority—it would be void for viewpoint bias.").

4. Defendants' Mischaracterization Of The Ads As "Political In Nature" Is Unconstitutional Because It Does Not Survive Strict Scrutiny

Although Defendants' conduct was unconstitutional even under the reasonable and viewpoint neutral standard, Second Circuit precedent supports application of the more intensive strict scrutiny standard, which Defendants' actions cannot satisfy.

The parties agree that MTA's advertising space is a limited public forum.[15] The Second Circuit has explained the difference between a limited public forum and a nonpublic forum. In creating a limited public forum, the government "limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *R.O. ex rel. Ochschorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 539 (2d Cir. 2011) (internal quotation marks and emphasis omitted). For a nonpublic forum, by contrast, the government "reserve[s] eligibility to select individuals who must first obtain permission to gain access." *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002). In a limited public forum, the restriction of the forum to a certain class of speakers or the discussion of certain subjects need only be viewpoint neutral and reasonable, but strict scrutiny is accorded to "restrictions on

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15 *See* MTA Br. at 19.

speech that falls within the designated category for which the forum has been opened." *Hotel Emps.*, 311 F.3d. at 545.

Viewed in that context, the Revised Policy opens a limited public forum for certain types of speech, namely speech that falls within the Permitted Categories. For example, the Revised Policy states, "[i]n furtherance of the MTA's purpose of maximizing advertising revenue, the MTA in its proprietary capacity is limiting all advertisements it will accept for display in and on the Property to paid commercial advertising, certain public service announcements that will help build goodwill for the MTA among its riders and the public, and governmental messages."[16] Thus, the Permitted Categories are the "designated categor[ies] for which the forum has been opened," and must only be reasonable and viewpoint neutral. *See Hotel Emps.*, 311 F.3d at 545. For example, if a person wanted to place an ad that said only, "Vote For Jeb Bush," the ad would not be permissible under the Revised Policy because it does not fall under one of the Permitted Categories. However, because Defendants created a limited public forum for speech that falls within the Permitted Categories, any further restrictions on such speech must meet strict scrutiny. *See Travis v. Owego Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991) ("Thus, in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004) ("Restrictions on speech *not within the type of expression allowed in a limited public forum*, must only be reasonable and viewpoint neutral." (emphasis added)).

The structure of the Revised Policy makes clear that the exclusion of speech that is "political in nature" is just such a restriction subject to strict scrutiny. The Revised Policy states that "[n]otwithstanding the foregoing" (i.e., whether the speech fits in any of the Permitted Categories), "the MTA will not accept any advertisement for displays in or on the Property if it falls within one or more of the following categories," including ads that are "political in nature."[17] These conditions do not simply refine the Permitted Categories, but selectively restrict speech that falls within them. As Defendants acknowledge, the commercial and political categories are not mutually exclusive—speech can be "commercial advertising," but also "political in nature." MTA Br. at 20–21. In other words, Defendants have welcomed speech that falls within the Permitted Categories into the forum, but restricted the content to selectively prevent speech that they deem "political in nature." Such a restriction on the content of speech that falls within the genre for which the limited public forum was created is precisely the type of restriction to which strict scrutiny applies.

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[16] MTA Board Action Items, Exhibit I to Compl., at 164.

The case Defendants describe as one of the only Second Circuit cases to actually apply this standard, *Travis v. Owego-Apalachin School District*, 927 F.2d 688, is consistent with this interpretation. In *Travis*, the defendant school district had a policy governing the use of school facilities pursuant to a state law that permitted local boards of education to open school facilities to the community "for various educational, civic, recreational, and social purposes." *Id.* at 689–90. Citing this policy, the district denied the plaintiff, a "pro-life" organization, access to the school facilities for a fundraising event. *Id.* at 690. The Second Circuit found that by previously permitting a Christian organization to use the school facilities for a Christmas program, the district had "created at least a limited public forum for fund-raisers with religious themes," and therefore, "[e]ven if the forum was limited, Travis, being within the category for which use had been permitted, could not be denied access absent a sufficient constitutional justification. No

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17 MTA Board Action Items, Ex. I to Compl., at 166.

such justification has been proffered." *Id.* at 693. The Second Circuit was vague as to the standard that should be applied, and ultimately declined to decide whether the forum was a designated public forum or a limited public forum, finding the restriction viewpoint discriminatory. However, Second Circuit cases since then have clarified that the standard to be applied in that exact circumstance (i.e. when speech is within the "category for which use had been permitted") is strict scrutiny. *See Hotel Emps.*, 311 F.3d. at 545–46; *Children First Found., Inc. v. Fiala*, 790 F.3d 328 (2d Cir. 2015), *withdrawn in part on other grounds*, No. 11-5199, 2015 WL 4636601 (2d Cir. Aug. 5, 2015) (Mem.).[18] Thus, because the Revised Policy is structured to invite into the limited public forum "commercial advertisements," such as VQP's Ads, its rejection of those Ads as "political in nature" must meet strict scrutiny. Moreover, displaying ads for *Mr. Robot* and *Straight Outta Compton*, Defendants have created at least a limited public forum for advertisements of media productions that the creators have connected to topics in the public discourse, which includes the Ads, thereby subjecting its rejection of the Ads to strict scrutiny.

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[18] The cases Defendants cite in an attempt to convince the Court that the reasonable and viewpoint neutral standard applies here are distinguishable. In *AFDI v. MTA*, No. 14 Civ. 7928 (JGK) ("*AFDI III*"), 2015 WL 3797651, at *6 n.5 (S.D.N.Y. June 19, 2015), *appeal filed* June 22, 2015, the court did not decide whether strict scrutiny should apply to further restrictions on within-Permitted-Category-speech, and we proffer that the plaintiffs' political speech did not fit within one of the Permitted Categories. The First Circuit's opinion in *AFDI v. Mass. Bay Transp. Auth.* is also inapplicable because the advertising policy at issue in that case established a nonpublic forum by providing the standards that the transportation authority would use to accept or reject advertisements on a case-by-case basis; it did not establish a limited public forum by creating categories of "permissible advertisements," as defendants have done here. *See* 781 F.3d 571, 574–75 (1st Cir. 2015), *petition for cert. filed*, No. 15-141 (July 30, 2015); Exhibit 5 to Am. Compl., *AFDI v. Mass. Bay Transp. Auth.*, 989 F. Supp. 2d 182 (D. Mass. 2013).

Because the Defendants have neglected to identify a compelling government interest, let alone explain how the rejection of the Ads was narrowly tailored to serve that interest, the rejection clearly fails to satisfy the strict scrutiny standard.

B. Defendants Violated The Free Speech Clause Of The First Amendment By Purposefully And Unreasonably Delaying Display Of VQP's Ads For More Than Five Months

Apart from their constitutional violations under the Revised Policy, Defendants violated the First Amendment by purposefully and unreasonably delaying approval of the Ads to avoid displaying them while the 2012 Advertising Standards were in force. Further, Defendants' delay was caused in part by censoring the content of the Ads in plain violation of those standards.

VQP alleges that it first submitted the Ads to Outfront Media on November 10, 2014. Compl. ¶ 24. Outfront Media was, at all times relevant to this lawsuit, an authorized agent for Defendants. *Id.* ¶ 23. As Defendants' agent, Outfront Media, was acting on Defendants' behalf, and its words and actions were binding on Defendants. *See* Bryan A. Garner, Black's Law Dictionary 67 (8th ed. 2004) (definition of "Agency"). The Revised Policy that Defendants claim prohibits the Ads did not become effective until April 29, 2015, *more than five months later*, yet Defendants never ran the Ads. Compl. ¶ 35. Virtually all of the intervening delays were attributed to Outfront Media or to Defendants directly. The circumstances surrounding the delays make it clear that Defendants purposefully deferred the Ads until after the Revised Policy was enacted, so they could unconstitutionally deny VQP's access to the designated forum they created through promulgation of the 2012 Advertising Standards. *See id.* ¶¶ 29–34. The Complaint alleges the factual circumstances surrounding Defendants' delay with particularity:

- Defendants took several weeks after receiving the Ads to require VQP to remove the word "penis" from one ad and resubmit it, even though the ad as originally submitted was fully compliant with the 2012 Advertising Standards. *Id.* ¶ 25. "Penis" is not reasonably interpreted as "patently offensive" or criminally "obscene," the categories of prohibited advertising under the policy then in force. 2012 MTA Advertising Standards § (a)(iv) (Ex. G to Compl.). (Defendants' assert that they merely "suggested two small changes," as though they were not the arbiters of content and were seeking to help VQP, but VQP's allegation that the changes were *required* must be accepted as true for purposes of Defendants' Motion to Dismiss. *See* MTA Br. at 13.)

- After VQP re-submitted the ad with the required change, Defendants waited yet another month before taking any action, and, even then, the action they took was to ask VQP again to make the change *it had already made*. Compl. ¶ 26. Defendants' additional interference exacerbated the original delay.

- Defendants next asked Outfront Media for more information about VQP. *Id.* ¶ 27. Defendants did so even though their advertising standards place no limit on who may advertise and there was no indication that VQP was anything other than a video production company duly registered under New York law. *See* Ex. G to Compl.; Compl. ¶ 27.

- Months after receiving the Ads, Defendants required another change not sanctioned by the policies then in force. They required VQP to remove the phrase "stepping in poop" from the ad that listed things Muslims hate. Compl. ¶ 27. Again, this phrase is not reasonably interpreted as "patently offensive" or criminally "obscene," the categories of prohibited advertising under the policy then in force. 2012 Advertising Standards § (a)(iv) (Ex. G to Compl.).

- After waiting for what Outfront Media noted was an unusually long time for approval, Compl. ¶ 29, Defendants finally approved the Ads for display on March 25, 2015. *Id.* VQP and Outfront Media contracted for the display of the Ads and VQP had them printed and hired a public relations firm to promote the ad campaign. *Id.* ¶ 31.

- On April 22, 2015, Outfront Media informed VQP that it would try to post some copies of the Ads in the subway system on April 27, 2015, but that, in any event, they would be posted by April 28, 2015. *Id.* ¶ 32. Outfront Media even told VQP on April 28, 2015, that the Ads were being prepared for display *that very day*. *Id.* ¶ 33.

- Nevertheless, the Ads were neither posted in the subway system on April 28, 2015, nor any day after. *Id.* ¶ 34.

- Defendants issued the Revised Policy on April 29, 2015, *id.* ¶ 35, and on May 1, 2015, Defendants informed VQP by telephone that this new policy would prohibit the display of the Ads, *id.* ¶ 38. They confirmed this statement in writing on May 6, 2015. *Id.* ¶ 40.

"[Constitutional] rights are as effectively stifled by delay as by suppression." *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 94 (2d Cir. 1968). In this case, Defendants both delayed and suppressed VQP's free speech rights. From November 10, 2014, the date on which VQP submitted the Ads to Outfront Media, through April 28, 2015, the day before Defendants changed their advertising policy, VQP had a constitutional right to run the Ads on the MTA's subway system, which was a designated public forum during that time. MTA Br. at 35 (acknowledging that MTA had "approved the [Ads], and was fully prepared to display them as of April 2015"). VQP has specified how it diligently sought to exercise its free-speech rights in a manner that was, by all accounts, wholly consistent with the advertisement policies then in place.

Separate from VQP's entitlement to injunctive relief under the Revised Policy, it is also entitled to nominal damages for Defendants' past constitutional violation under the previous policy. *See Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d Cir. 1998) ("Nominal damages are available in actions alleging a violation of constitutionally protected rights, even without proof of any actual injury."); *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1526 (10th Cir. 1992) (finding that while adoption of a new policy mooted claims for injunctive relief, "the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct") (emphasis in original). That entitlement is alone sufficient to deny Defendants' Motion to Dismiss.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss.

Dated: September 11, 2015
Washington, D.C.

Respectfully submitted,

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